FOR ARGUMENT

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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

vs.

FRANCES B. DAVIS,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Brief of the California Association for the Physically Handicapped, California Epilepsy Society, Epilepsy Society of San Diego, Los Angeles County Epilepsy Society, California Paralyzed Veterans of America, California Association for Physically Handicapped Service Center, Center for Living Independently in Pasadena, Inc., Community Resources for Independence, Community Service Center for the Disabled, Inc., Contra Costa County Independent Living Center, Dayle McIntosh Center for the Disabled, Disabled Resources Center, Inc., Independent Living Center, Inc., Resources for Independently Living, Inc., Rolling Start, Inc., San Francisco Independent Living Project, Westside Community for Independent Living, Inc., Disability Law Center, Disabled Students Coalition, Los Angeles Council for the Handicapped, National Federation of the Blind of California, National Tuberous Sclerosis Association, Southern California Chapter of the National Multiple Sclerosis Society, United Cerebral Palsy-Spastic Childrens Foundation of Los Angeles County, Western Law Center for the Handicapped, as Amici Curiae.

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Interest of Amici.

Section 504 of the Rehabilitation Act—the Civil Rights Act for handicapped persons—has been trumpeted as one of the most important pieces of legislation in our history. Its goal was to open a new world of equal opportunity for more than 35 million handicapped persons—the blind, the deaf, persons confined

to wheelchairs, the mentally ill or retarded, and those with other handicaps.

Amici have a vital stake in seeing that the fundamental principle embodied in §504—that handicapped persons are to be treated equally, and as equals—is realized.

The California Association of the Physically Handicapped represents and advocates the interests of its over 4,000 disabled members.

The California Epilepsy Society, the Epilepsy Society of San Diego, and the Los Angeles County Epilepsy Society assist people with epilepsy in the areas of employment, driving, counseling, and discrimination. These amici have 5,000 members.

California Paralyzed Veterans of America provides services and advocacy to protect the interests of disabled veterans.

California Association for Physically Handicapped Service Center in Fresno, Center for Living Independently in Pasadena, Inc., Community Resources for Independence in Santa Rosa, Community Service Center for the Disabled, Inc., in San Diego, Contra Costa County Independent Living Center, Dayle McIntosh Center for the Disabled in Garden Grove, Disabled Resources Center, Inc., in Long Beach, Independent Living Center, Inc., in Van Nuys, Resources for Independently Living, Inc., in Sacramento, Rolling Start, Inc., in San Bernardino, San Francisco Independent Living Center, and the Westside Community for Independent Living, Inc., in Los Angeles are all organizations of disabled persons providing direct services to the disabled so that they m ght live independently, as full citizens, in their own communities. Such services include transportation, independent living skills, financial counseling and attendant care. Combined, they serve over 10,000 disabled people per year and cover a service area which includes over 500,000 disabled persons.

The Disability Law Center provides free legal services to the physically disabled in Santa Clara County.

The Disabled Students' Coalition is a coalition of disabled students in post-secondary education at the more than 100 community colleges, 9 University of California campuses, 19 State University and College campuses, and 225 private post-secondary educational institutions in California.

The Los Angeles Council for the Handicapped is an arm of the city government which serves the special needs of the disabled.

The National Federation of the Blind of California promotes the interests of the blind by expanding education and employment opportunities.

The National Tuberous Sclerosis Association promotes basic and genetic research concerning the enigmas of tuberous sclerosis.

The Southern California Chapter of the National Multiple Sclerosis Society provides counseling and advocacy services for the approximately 4,000 persons in Los Angeles County with multiple sclerosis.

United Cerebral Palsy/Spastic Childrens Foundation of Los Angeles County provides services to people with cerebral palsy and associated developmental disabilities.

The Western Law Center for the Handicapped is a public interest law firm concerned exclusively with protecting the legal rights of people with disabilities.

For the reasons set forth in their brief, amici respectfully urge the court to affirm the judgment of the court below.

I

A State Community College, Receiving Federal Financial Assistance, Has a Duty Under §504 of the Rehabilitation Act and Its Implementing Regulations to Make Such Modifications to Its Academic Requirements as Are Necessary to Insure That Such Requirements Do Not Discriminate, or Have the Effect of Discriminating, on the Basis of Handicap, Against a Qualified Handicapped Applicant.

The Southeastern Community College ("College"), a public educational institution, receiving federal financial assistance, denied Frances B. Davis, a licensed practical nurse, admittance to the College's Associate Degree Nursing Program ("Program") because of her hearing disability. The district court held that although Ms. Davis was plainly a "handicapped individual" within the meaning of 29 U.S.C. §706(6), the College did not discriminate against her in violation of §504 of the Rehabilitation Act (29 U.S.C. §794). At the time the district court made its decision, the Secretary of Health, Education and Welfare ("HEW") had not yet promulgated his regulation implementing §504. That regulation became effective approximately six months after the district court's decision. The Court of Appeals in a "rather narrow" holding, vacated the judgment of the district court and remanded the case to give the College the opportunity to reconsider Ms. Davis' application for admission to the nursing program in light of the HEW regulations.

The Court of Appeals concluded that the district court gave a too grudging reading to the statutory language "otherwise qualified" found in §504, particularly in light of the interpretation of those words in the HEW regulation.

The Court of Appeals disagreed with the conclusion of the district court that Ms. Davis was not "qualified" to participate in the nursing program and pursue her chosen profession as registered nurse. In response to the district court's contention that Ms. Davis was not qualified because in certain situations, such as in an operating room environment where surgical masks are used, her ability to read lips would be unavailable to her, the Court said:

> "Be that as it may, in the medical community, there does appear to be a number of settings in which the plaintiff could perform satisfactorily as an RN, such as in industry or perhaps a physician's office. Certainly the plaintiff could be viewed as possessing extraordinary insight into the medical and emotional needs of those with hearing disabilities. If the plaintiff meets all the other criteria for admission in the pursuit of her RN career . . . it should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers." 574 F.2d at 1161, n.6.

The core question presented in this case in whether §504 should be given a broad, liberal interpretation or a narrow, grudging one. Petitioner argues that the Fourth Circuit's reading of §504, while "perhaps more literal" than the reading given it by the district court, is erroneous. According to petitioner, the Court of

Appeals mistakenly "relied upon a selective and questionable reading of certain HEW regulations and explanations of the statutory words, which had been released some time after the district court's decision." (Brief for Petitioner p. 24.)

Initially, it should be remembered that we deal with a civil rights statute designed to remedy long lasting and deep discrimination against a powerless minority. The interpretation of §504 must therefore be made in light of this Court's repeated declaration that Civil Rights Acts should be accorded a sweep as broad as their language permits. *Griffin v. Breckenridge,* 403 U.S. 88, 98 (1971); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 437 (1968); *United States v. Price,* 383 U.S. 787, 801 (1966).

Additionally, the weight to be given the HEW regulation is great, since Congress and the President called upon HEW to coordinate government-wide enforcement of §504. In *Cherry v. Matthews,* 419 F.Supp. 522 (D.C. D.C. 1976), the court, after reviewing the legislative history of §504,[1] concluded that the Secretary of HEW "is required to promulgate regulations effectuating §504." Executive Order No. 11941, 41 F.R. 17871 (April 29, 1976), made HEW primarily responsible for implementing and coordinating enforcement of §504. In response to this Executive Order, Secretary Califano issued a second regulation on January 13, 1978 dealing with §504, coordinating all government-wide enforcement of that statute. 43 Fed. Reg. 2132.

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[1]*See* S.Rep. No. 93-1139, 93d Cong., 2d Sess. 24-25 (1974); H.R.Rep. No. 32-1457, 93d Cong., 2d Sess. 27-28 (1974); S. Rep. No. 32-1297, 93d Cong., 2d Sess. 39-40 (1974).

Amici now turn to the HEW regulations which petitioner asks this Court to undermine.

A.

In remanding the case to the district court for further proceedings, the Court of Appeals suggested that the district court give "close attention" to respondent's claim for some sort of "affirmative relief" under §504 and the relevant HEW regulations—particularly those dealing with modifying the academic requirements of an educational program and providing auxiliary aids to students with impaired sensory skills.[2]

The initial HEW regulation is divided into seven parts, subpart (E) dealing with post-secondary education. It proscribes discrimination against handicapped persons in admission, and states: "Colleges and universities are required to make reasonable adjustments to permit handicapped persons to fulfill academic requirements, and to insure that they are not effectively excluded from programs because of the absence of auxiliary aids." 42 Fed.Reg. 22676, 22677. The Court of Appeals pointed to a number of sections in the regulation implementing this broad policy statement. 45 C.F.R. §84.44(a); §84.44(d)(1); §84.43(c); and §84.12(a). Those sections call upon a college or university to make such modifications to its academic requirements as are necessary to insure that they do not discriminate, or have the effect of discriminating on the basis of handicap, against a qualified handicapped applicant or student. The modifications called

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[2]S.Rep. No. 32-1297, 93d Cong., 2d Sess. 39, reprinted in [1974] U.S. Code Cong. & Adm. News at 6390, states: "Where applicable, §504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination."

for may include changes in the specific courses required and adaptation of the manner in which specific courses are conducted. Petitioner does not deny that it could make the necessary adjustments to enable Ms. Davis to satisfactorily complete the nursing program. The position of the College, as the Court of Appeals stated was clear—"It was not prepared, from a faculty viewpoint, to adequately supervise and train the plaintiff during her clinical training. Therefore, it could not modify its program to compensate for plaintiff's hearing disability." 574 F.2d at 1162. The Court of Appeals remanded the case to the district court to consider whether the College "could be required to modify the nursing program so as to accommodate the plaintiff and her hearing disability." *Ibid.*

B.

Petitioner's basic contention is that it can exclude Ms. Davis from its program if it concludes that she would not be "*fully* qualified in *all* respects." (Petitioner's Brief p. 24, emphasis added.) As already noted, the Court of Appeals, relying on the HEW regulation, was of the view that Ms. Davis' hearing disability would not disqualify her from participating in the nursing program or from working as an RN if there are "a number of settings in which [Ms. Davis] could perform satisfactorily as an RN, such as in industry or perhaps a physician's office." 574 F.2d at 1161, n.6.

Contrary to the impression petitioner seeks to give, this case does not involve an application by Ms. Davis for employment as a nurse in an operating room. Rather, she seeks to upgrade herself, to move from a licensed practical nurse, performing certain nursing

functions, to a registered nurse, a professional. Petitioner argues that Ms. Davis must be denied this opportunity because to go through the program, "she must continue to use her hearing aid and she must continue to read lips for effective communication." Worse, according to the petitioner, Ms. Davis "is now apparently seeking additional kinds of special training, as well as individual supervision in her projected RN rounds." (Petitioner's Brief p. 46.)

Amici respectfully submit that petitioner's argument that Ms. Davis must be denied the opportunity of proving that she can work as a registered nurse, effectively, if unconsciously, reduces Ms. Davis' chance to live a dignified life as a first class citizen. Timothy M. Cook, a lawyer and a disabled individual, discusses the subtle pressures society imposes on handicapped persons to play the role of "cripple", in his article "Blind Discrimination in Employment Under Rehabilitation Act of 1973," 27 The American University Law Review 31 (1977):

> "I learned that the cripple must be careful to not act differently from what people expect him to do. Above all they expect a cripple to be inferior to themselves, and they will become suspicious and insecure if the cripple falls short of these expectations. It is rather strange, that the cripple has to play the part of the cripple, just as women have to be what the men expect them to be, just women; and that Negroes often have to act like clowns in front of the 'superior' white race, so that the white man shall not be frightened by his black brother."

According to petitioner's argument all colleges and universities receiving federal financial assistance may exclude all deaf and blind persons from the medical and nursing professions and virtually all other professions. It is true that the district court stated that under §504, "it would most probably be impermissible to exclude a blind or deaf person from admission to law school, if academically qualified" (424 F.Supp. at 1345) and petitioner apparently takes the same view. (Petitioner's Brief pp. 29, 38.) Amici respectfully submit, however, that if, as petitioner contends, a professional must be "*fully* qualified in *all* respects" a deaf or blind prospective lawyer would not pass petitioner's test.

Petitioner finds its guiding principle in *Bradwell v. The State,* 83 U.S. (16 Wall.) 130 (1872) where the Court concluded that women constitutionally could be denied the right to practice law. Referring to the Court's conclusion as "outmoded and unfortunate" petitioner nevertheless asserts that Mr. Justice Bradley uttered a truism when he wrote:

> "In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence." (Petitioner's Brief pp. 29-30.)

The difficulty with a "truism" is, as history repeatedly teaches, that it is often not true. In *Muller v. Oregon,* 208 U.S. 412 (1908) the Court dealt with an Oregon statute which provided that no woman could work

in certain establishments for more than ten hours a day. In upholding the validity of the statute against constitutional attack, the Court asserted that states have power to establish legislation designed to safeguard the health of women because "healthy mothers are essential to vigorous offspring. . . ." 208 U.S. at 421. In *Miller v. Wilson,* 236 U.S. 373 (1915), the Court upheld similar legislation based upon the fact that a woman's "physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man." *Id.* at 381.

According to the "truism" which held sway until recent times, women were "the weaker sex" and certainly unsuitable for military service. Yet today women serve in 384 of the army's 419 MOS's ("Military Occupational Specialty"). See "Getting Straight on WAAC's", 23 Army Reserve Magazine 7, 8 (January/February 1977). And, just as women are finding increased employment in the armed forces, handicapped persons too are increasingly employed in the military.

The Air Force for instance has long been a leader in the hiring of handicapped individuals. As of December 31, 1977, the Air Force employed 24,687 handicapped employees including disabled veterans. Air Force Affirmative Action Plan—1979 ("Air Force Plan"). In addition to having a large overall handicapped population, "statistical breakdowns of employment location indicate that all major organizational elements of the Air Force (Major Commands and Separate Operating Agencies) are well represented in numbers and types of handicapped employees." Air Force Plan, Objective 5. Handicapped employees of

the Air Force "are being promoted at the same or better rate" than the Air Force's total work force. "All Air Force handicapped employees are routinely considered for positions filled under the Air Force Upward Mobility Program." The handicapped work force fares as well as, or better than, the nonhandicapped work force. Air Force Plan, Objective 6. To ensure employment, the Air Force has completed a survey of all installations to identify architectural barriers. As new handicapped employees are hired or when current employees develop a handicap, the employee's work site is analyzed to determine what, if any, architectural barriers need to be eliminated and what other types of equipment, warning devices, etc., are needed for the employee to be able to perform effectively and safely. Air Force Plan, Objective 9.

Amici respectfully submit that if Southeastern Community College took the same positive view taken by the Air Force, Ms. Davis would now be a registered nurse. Instead, the College, relying on archaic notions concerning the ability of handicapped persons, has imposed unnecessary, unfair and illegal barriers to Ms. Davis' efforts to be treated like a normal human being, entitled to shape her own course in life. Patricia Harris, Secretary of the Department of Housing and Urban Development, speaking at the White House Conference on Handicapped Individuals (May 25, 1977) said, quoting Helen Keller:

> "A person who is severely impaired never knows his hidden sources of strength until he is treated like a normal human being and encouraged to shape his own life."

In enacting §504, Congress sought to make participation in society more feasible for handicapped individuals. Ms. Davis seeks to convert the Congressional promise into reality. In the past two decades the nation has come to realize that Americans with disabilities are an oppressed and, all too often, hidden minority, subjected to unconscionable discrimination, beset by demoralizing indignities, detoured out of the mainstream of American life and unable to secure their rightful role as full and independent citizens. The federal government has made a commitment to end this unconscionable discrimination against our nation's handicapped. Beginning in 1948 with the congressional enactment of Public Law 87-614, which prohibited the federal Civil Service from discriminating against a person on the basis of physical handicap, 5 U.S.C. §7153, the federal government has established the legal framework with which to end discrimination for a majority of handicapped Americans in employment and elsewhere.

Senator Birch Bayh, in a foreword to the symposium issue on Employment Rights of the Handicapped, stated that congressional enactment of §504 "may be one of the most important pieces of legislation in our nation's history". 27 DePaul L.Rev. 943, 944 (1978) (hereinafter DePaul). Senator Bayh there stated that the right to work is one of the most basic of all our cherished rights, giving an individual "not only economic self-sufficiency, but also a sense of dignity, self-worth, and the satisfaction of making a contribution to our society". DePaul at 943. Explaining the high unemployment rate of the handicapped, and the underemployment rate of the handicapped, and the underemployment of handicapped persons, Senator Bayh stated that "the most crucial deterrent to employment seems to be attitudes of employers. Acting upon stereotypes,

many employers fear that the handicapped person will be unable to perform assigned tasks. This attitude exists despite studies showing that a handicapped worker, when assigned to an appropriate position, performs as well or better than his nonhandicapped coworkers." DePaul at 944.

Approximately four years after Congress enacted §504, and after an action was initiated to force the Secretary of HEW to promulgate a regulation implementing that statute (*Cherry v. Matthews,* 419 F.Supp. 522 (D.C. 1976)), Secretary Califano issued a press release ("release") announcing the issuance of his regulation.[3] The Secretary's release states:

> "I am issuing a regulation, pursuant to Section 504 of the Rehabilitation Act of 1973, that will open a new world of equal opportunity for more than 35 million handicapped Americans—the blind, the deaf, persons confined to wheelchairs, the mentally ill or retarded, and those with other handicaps. The 504 Regulation attacks the discrimination, the demeaning practices and the injustices that have afflicted the nation's handicapped citizens. It reflects the recognition of the Congress that most handicapped persons can lead proud and productive lives, despite their disabilities. It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-sufficiency and decent treatment will begin to fall before the force of law." Release, pages 1-2.

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[3]The release was dated April 28, 1977. The regulation was published May 4, 1977, 42 Fed.Reg. 86. The effective date of the regulation is June 3, 1977 The regulation may be found in Title 45 Code of Federal Regulations, Sec. 84.

Secretary Califano recognized that the statute and the implementing regulation were meant to work fundamental changes in many facets of American life. The implementing regulation he stated, "Calls for dramatic changes in the action and attitudes of institutions and individuals who are recipients of HEW funds." Release, page 2. The Regulation, he stated, "not only bars recipients of HEW funds from unfairly excluding handicapped individuals, but it also requires positive steps to give handicapped citizens meaningful equality of opportunity. . . . Discriminatory practices directed toward handicapped persons—just like those directed at racial minorities and women—are often deeply ingrained. We must recognize that positive steps will, in some instances, be required so that handicapped individuals are able to learn, to work, and to compete on a fair and equal basis. Admitting a deaf child to a class, for example, is a meaningless gesture unless an interpreter is also available to communicate the teacher's words." Release, page 6.

Finally, Secretary Califano stated, "The 504 Regulation today becomes the law of the land, and it is critically important that we obey that law and make these new rules a reality for handicapped Americans."

Recently, Congress passed and the President signed the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978. The Floor Manager for the Bill was Senator Cranston. Speaking on the Bill on August 16, 1978 (Congressional Record, 95th Cong., 2d Sess. Vol. 124, No. 12147) Senator Cranston stated:

> "Mr. President, there is a great new civil rights struggle going on in our country. Long neglected

> Americans are seeking, with good reason, their full and equal share of the rights to which all are entitled in our land. Accessibility for handicapped individuals must be viewed in that context —it is an issue of civil and human rights. I believe strongly that we must assure that the rights and opportunities accorded every other American are accorded to handicapped Americans."

Addressing himself to the new provisions for attorneys fees under §504 actions, the Senator stated:

> "Such allowance of attorneys fees would be an important step in assisting all handicapped individuals in their struggle by permitting equal access to the courts to enforce the provisions of Title V of the Rehabilitation Act of 1973. . . . [T]he rights extended to handicapped individuals under Title V of the Rehabilitation Act of 1973 . . . non-discrimination under Federal grants—are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance. Private enforcement of these Title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys fees should assist substantially in this respect."

Senator Cranston's statement echoes the long established public policy of the United States designed to integrate—rather than segregate—disabled persons. On December 7, 1974, Congress enacted the White House Conference on Handicapped Individuals Act (Title III of Pub.L. 93-516, 88 Stat. 1631-1634; see Historical Note under 29 U.S.C. §701) stating:

> "The benefits and fundamental rights of this society are often denied those individuals with mental and physical handicaps"; "It is of critical importance to the nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps."

On September 7, 1978, the President of the United States declared (Proclamation 43 F.R. 40197; 1978 U.S. Code Cong. and Adm. News, p. 3508):

> "Our country's greatest resource is its people—including those with physical and mental disabilities . . . local, state and Federal laws and regulations are beginning to ensure equal rights to the disabled, so that they will no longer be second-class citizens. . . . The private sector, too, is being made aware of its duties and responsibilities. . . ."

In *Bartels v. Biernat,* 405 F.Supp. 1012 (E.D. Wis. 1975), Judge Warren, discussing the public interest in having mass transportation available to handicapped persons, stated:

> "[S]ociety has a distinct interest in utilizing every possible source of human skill and ingenuity, including the skills and talents of mobility handicapped individuals. When effectively confined . . . not only are the handicapped deprived of the myriad benefits of society, but society is deprived of the valuable contributions of these otherwise normal human beings. And this deprivation is compounded by the fact that, when unable to fend for themselves, the handicapped must depend

upon the public purse for their sustenance. This is a burden that should be inflicted upon neither the . . . handicapped nor society in general." *Id.*, 405 F.Supp. at 1015-16.

II

Section 504 Absent Regulations Requires Recipients of Federal Financial Assistance to Make Reasonable Accommodation to the Limitations of a Handicapped Person.

Petitioner and the Commonwealth of Massachusetts and other state amici ("Massachusetts Brief") argue, relying on the "otherwise qualified" language in §504, that §504 imposes no obligation on a recipient of federal financial assistance other than not to arbitrarily exclude because of a handicap (Petitioner's Brief pp. 22-30; Massachusetts Brief pp. 13-15). Certainly §504 prohibits arbitrary exclusion. *Duran v. City of Tampa*, 430 F.Supp. 75 (M.D. Fla. 1977).

But §504 goes farther than merely outlawing a federal financial recipient's arbitrary treatment to a handicapped person or group. Section 504 protects those who are denied equal opportunity both because of the stigma attached to their disability and because their disability requires an individualized approach. The Aesop's fable looked to in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), provides guidance here as well. When looking to the Title VII objectives of equal employment opportunity, this Court observed:

> "Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity only in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices which are fair in form, but discriminatory in operation."
>
> *Griggs v. Duke Power Co., supra,* 401 U.S. at 431.

The procrustean application of entrance and participation requirements may be a practice which is fair in form but discriminatory in operation when it excludes persons from participation solely because of a handicap. Recipients of federal financial assistance may be required to do more than set the table with vessels from which the foxes can drink; they may also be required to set the places of the storks with vessels from which they too can drink.

Congress' reference to "accommodation" in §505(a)(1), 29 U.S.C. §795(a)(1), added by the 1978 amendments to the Rehabilitation Act, indicated Congress understood the prohibition against discrimination on the basis of handicap in Title V of the Rehabilitation Act, 29 U.S.C. §791 *et seq.*, incorporated an obligation to accommodate to the limitations of the protected class.

Relevant here is the reasoning of the Supreme Court of the State of Washington in *Holland v. Boeing*, 90 Wash.2d 384, 583 P.2d 621 (1978). In that case the court concluded that a state statute prohibiting employment discrimination on the basis of handicap necessarily included an affirmative obligation to accommodate to the limitations of the handicapped individual:

"In 1973, the legislature amended the law against discrimination . . . to include a prohibition against discrimination in employment because of physical, mental, or sensory handicaps. It recognized that the disabled, like many minority groups, face serious problems in seeking employment. . . . Legislation dealing with equality of sex or race was premised on the belief that there was no inherent differences between the general public and those persons in the suspect class. The guarantee of equal employment opportunities for the physically handicapped is far more complex.

"The physically disabled employee is clearly different from the nonhandicapped employee by virtue of the disability. But the difference is a disadvantage only when the work environment *fails* to take into account the unique characteristics of the handicapped person. . . . Identical treatment may be a source of discrimination in the case of the handicapped, whereas *different* treatment may eliminate discrimination against the handicapped and open the door to employment opportunities.

". . . When, in 1973, the legislature chose to make this policy applicable to discrimination against the handicapped, we believe it is clear it mandated positive steps be taken. An interpretation to the contrary would not work to eliminate discrimination. It would instead maintain the *status quo* wherein work environments and job functions are constructed in such a way that handicaps are often intensified because some employees are not physically identical to the 'ideal employee'." *Id.*, 583 P.2d at 623.

Thus analyses of statutes protecting the civil rights of blacks which are premised on the belief that there was no inherent difference between them and the general public are not necessarily applicable to a statute protecting the civil rights of a protected class whose differences are recognized and are indeed the basis for being in a protected class. Petitioner's reliance (Petitioner's Brief p. 23) on this Court's interpretation of 42 U.S.C. §1971(c) in *United States v. Mississippi*, 380 U.S. 128, 138 (1965) is therefore misplaced. Lower courts have found that §504 requires recipients to accommodate to the limitations of handicapped persons so that they may have equal access to federally assisted programs. *Hairston v. Drosick*, 423 F.Supp. 180, 184 (S.D. W.Va. 1976) ("School officials must make every effort to include such [handicapped] children within the regular public classroom situation, even at great expense to the school system."); *Sherer v. Waier*, 457 F.Supp. 1039 (W.D. Mo. 1977). But the concept that equal access may require differential treatment is not unique to the handicapped. For instance, equal access to the criminal justice system has been held to require accommodation to the financial limitations of the accused. *Douglas v. California*, 372 U.S. 353 (1968). Similarly, equal access to state courts for divorce has been held to require accommodation to the financial limitations of the petitioner or respondent. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

Further, the Due Process Clause requires a form of notice reasonably calculated, under all the circumstances, to reach him whose property interest may be affected by a particular action. This may mean

different forms of notice for different classes of persons. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-320 (1950). In *Covey v. Town of Somers*, 351 U.S. 141, 146-47 (1956), this Court ruled unanimously that where the town officials giving notice knew the taxpayer intended recipient was incompetent, the officials were required to take measures in giving notice beyond those deemed sufficient in the case of an ordinary taxpayer. In essence, the town officials were required to accommodate to the taxpayer's handicap.

In *Sherbert v. Verner*, 374 U.S. 398 (1963) this Court ruled that absent of a compelling state interest justifying the burdening of the Sabbatarian's free exercise of religion by disqualification for unemployment insurance by her refusal to work Saturdays, the free exercise guarantees of the First Amendment barred the state from applying the general rule to the Sabbatarian—*i.e.*, it required the state to treat differently those who were unavailable Saturday because of Sabbatarian beliefs and those who were unavailable Saturday for other reasons.

A. Section 504 Does Not Require the Hiring of Blind Bus Drivers.

Petitioner and the Massachusetts Brief argue that any interpretation of §504 other than that advanced by them and the district court would necessarily result in, for instance, the hiring of blind bus drivers or the admission into law school of someone who, due to a learning disability, could not remember things (Petitioner's Brief p. 41; Massachusetts Brief p. 7). Petitioner and the Massachusetts Brief are incorrectly applying §504.

Where an individual has been excluded from access to or participation in a federally assisted program because of[4] his handicap, the first inquiry is whether or not the handicap interferes with the ability to participate in or benefit from the federally assisted program.[5] If the handicap does not so interfere with this ability to participate in or benefit from the federally assisted program, then exclusion on the basis of handicap cannot be justified. Petitioner and the Massachusetts Brief would stop here and go no farther. But if the handicap in fact interferes with the ability to participate in or benefit from the federally assisted program, then the next inquiry is whether the handicap can be accommodated so as to eliminate or minimize the handicap barrier to participation. HEW, the agency charged with the enforcement and administration of §504 has set out guidelines for reasonable accommoda-

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[4]Part of petitioner's and the Massachusetts Brief's problems with the statute's "otherwise qualified" language and the HEW regulations may stem from a failure to appreciate HEW's dual role of promulgating guidelines and enforcing compliance, and the regulations' role in serving these two ends. HEW has therefore set out an analysis model which assists it in determining whether an adverse action took place "because of" a handicap and if so, whether the action was nonetheless justified. The regulations' dual role is seen most clearly in the regulations relating to the timing of physical examinations in connection with employment. There is no substantive reason for the timing set out in the guidelines other than meeting the agency's compliance monitoring needs. *Compare* 41 CFR §60-741.6(c)(3) with 45 CFR §84.44 (a) and (c).

[5]Potential discrimination by others after graduation cannot justify exclusion from an education program. Women could not be excluded from a job training program because of the difficulty they would face seeking employment in a traditionally male area. *Cf., Thorn v. Richardson*, Civ. No. 9577, 4 FEP Cases 299 (W.D. Wash. 12-10-71). Nor could women be excluded from a correctional officer training program because some of the jobs available upon graduation would be BFOQ male. *Cf. Dothard v. Rawlinson*, 433 U.S. 321, 332-36 (1977).

tion to the handicap barriers to participation in educational programs. 45 CFR 84.44. But the handicap barrier of a learning disability which resulted in the person not being able to remember things obviously is one that cannot be eliminated or minimized through accommodation in the way that a barrier of blindness can be minimized by a reader, a barrier of mobility limitation can be minimized by a ramp, a barrier of a hearing impairment can be minimized by interpreters or/and special instruments.[6] Similarly the barrier of blindness and concomitant interference with safe driving is simply a barrier that is not amenable to accommodation.

B. The Obligation to Make Reasonable Accommodation to the Limitations of a Handicapped Person Is Not Limited to Employment by the Federal Government or a Federal Contractor.

Petitioner's Brief (at pp. 51-52) and the Massachusetts Brief (pp. 14-15) argue that because Section 504 does not contain the words "affirmative action" as do both Sections 503 and 501, only those provisions impose an obligation to make reasonable accommodation to the limitations of handicapped persons. Further, since Sections 503 and 501 relate only to employment, petitioner and the Massachusetts Brief argue that accommodation is relevant only to employment.

However, affirmative action is one of the means by which §504's equal access, nondiscrimination objectives are met. Congress made it plain that "where applicable, §504 is intended to include a requirement of

[6]The articles about deaf health professionals are attached in Appendix "A".

affirmative action as well as a prohibition against discrimination." Section 504 is couched in terms of objective or end result which Section 503 is couched in terms of process. Compare

> ". . . the party contracting with the United States *shall take affirmative action to employ and advance qualified handicapped individuals. . .*."
> Section 503, 29 U.S.C. §793(a).

with

> "No otherwise qualified handicapped individual . . . *shall . . . be excluded from participation in, be denied the benefits of,* or, *be subjected to discrimination under any program* or activity receiving Federal Financial assistance."
> Section 504, 29 U.S.C. §794.

C. Section 504 May Require Accommodation Involving More Than "De Minimis" Cost.

Both petitioner (at p. 56 of its brief) and the Massachusetts Brief (at p. 19) rely on this court's decision in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977) as supporting their position that economic considerations justified exclusion of Ms. Davis even should this court hold that reasonable accommodation is required under §504. That reliance is misplaced.

First, Title VII is applicable to all employers, with few exceptions, with 15 or more employees. 42 U.S.C. §2000e(b). By way of contrast, §504 applies only to those programs receiving federal financial assistance —not necessarily all of a recipient's activities. The §504 protections and obligations are imposed as a condition of receiving the federal financial assistance. Certainly since the issuance of the HEW regulations

any recipient of federal financial assistance understands the price of that assistance.

Second, in *Hardison* one of the factors about which this Court expressed concern was the impact of the accommodation to Mr. Hardison's religious beliefs on other employees and the potential discrimination against the other affected employees. 432 U.S. at 81, 84-5. Under §504 there is no such impact. Even assuming some dislocation of another program participant to accommodate to the needs of a handicapped program participant (*i.e.*, involuntary switching of a student from a downstairs accessible class to an upstairs class to accommodate to the limitations of a mobility impaired student), the status of being "nonhandicapped" is not a protected class and there is no "reverse" discrimination problem. Further, Mr. Hardison sought an accommodation which would have required TWA "to carve out a special exception to its seniority system . . ." 432 U.S. at 83. Under Title VII, however, seniority systems are afforded special treatment and action pursuant to a bona fide seniority system is not unlawful. 42 USC §2000e-2(h).

Third, all able-bodied persons may potentially be members of the class protected by §504. Through accident, disease, wear-and-tear, criminal assault, any one of the able bodied may develop involuntarily limitations requiring accommodation for equal participation. But conversion to a religious belief requiring special accommodation is not something which can be equated with the involuntariness of acquiring a disability.

Fourth, this Court's interpretation of the employer's duty to accommodate to the religious practices of its employees avoided a potential First Amendment Establishment clause problem. 432 U.S. at 70-71. No such problem exists under Section 504.

The Massachusetts Brief in support of petitioner asserts that it fully supports equal rights for handicapped individuals, as well as the purpose of §504 but, because of the "enormous financial and other burdens" associated with the administration of §504, opposes Ms. Davis' claim (at p. 2). The Massachusetts Brief (n.2, p. 2) points to a cost survey prepared by HEW estimating that the annual pecuniary cost of compliance with §504 has been set at 3.2 billion dollars.[7] It suggests that the expenditure of such a large sum of money to help end the shameful national neglect of handicapped individuals reflects a lack of "sensitivity to the legitimate interests of both state and national governments."[8] In so arguing, the Brief writers forget that our country's greatest resource is its people, including individuals with disabilities. The Massachusetts Brief asks this Court to give §504 and its implementing regulation a "practical" interpretation in light of economic burdens.

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[7]Much of the cost of accommodation is a function of facilities and roads built over the years without regard for the disabled segments of our society which have always been with us. Had access been built in initially, the cost of access would have been negligible and spread over decades. Further, there are often public and private sources other than the federally assisted program to pick up some of the costs of cost of accommodation —*i.e.*, services provided through state departments of vocational rehabilitation, charitable and volunteer groups, etc.

[8]Further, the Massachusetts Brief evaluates the cost of needed accommodation in a vacuum. Public expenditures for accommodating an education program may be offset by the elimination of the student's dependence on the public for support, by his becoming a taxpayer or more of a taxpayer. Indeed it is just such objectives of increased earning power and productivity of post-secondary graduates that cause states to fund public college and university systems. These objectives are no less present when the student is disabled.

A similar argument was made and rejected by this Court in *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978). In that case the Court of Appeal held that upon a showing that the existence of the snail darter would be jeopardized by completion of the Tellico dam it was the duty of the district court under the Endangered Species Act to enjoin completion of the dam. The Court of Appeal, while recognizing the irretrievable loss of millions of dollars of public funds which would accompany injunctive relief, nonetheless decided that the Act explicitly commanded precisely that result, saying:

> "It is conceivable that the welfare of an endangered species may weigh more heavily upon the public conscience, as expressed by the final millions of dollars already expended for Tellico in excess of its present salvageable value." 549 F.2d at 1074.

This Court affirmed. Mr. Chief Justice Burger, writing for the court, stated that Congress had spoken in the plainest words, making it clear that endangered species are to be accorded the highest priorities. Since that legislative power was exercised he said it is up to the executive branch to administer the law and for the judiciary to enforce. The Court acknowledged that it may seem curious to some "that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than 100 million dollars. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after Congressional appropriations committees were apprised of its

apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result." 437 U.S. at 172-3.

Mr. Chief Justice Burger refused to attempt to balance "the burden on the public through the loss of millions of unrecoverable dollars" with "the loss of the snail darter," saying:

> "Quite obviously, it would be difficult for a court to balance the loss of a sum certain—even 100 million dollars—against a congressionally declared 'incalculable' value, even assuming we have the power to engage in such a weighing process, which we emphatically do not." 437 U.S. at 187-88.

In reply to the contention that the relevant Congressional statutes be interpreted "reasonably" and in accord with some modicum of common sense and regard for the public weal the Chief Justice stated:

> "But is that our function? . . . Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities. . . .
>
> "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. . . .
>
> * * *

> "We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense in the common weal.' " 437 U.S. at 194-5.

In §504, the Congress sought to translate many of the legitimate needs of handicapped persons into legal rights. The Congress intended the law to work fundamental changes in many facets of American life and knew that it would cost money to implement the unequivocal statute. Congress also knew that, when unable to fend for themselves, the handicapped must depend upon the public purse for their sustenance. This imposes an even greater economic burden on society. More importantly, however, Congress concluded that the welfare of human beings with handicaps weighs more heavily upon the public conscience than the expenditure of large sums of money to aid handicapped persons seeking their full and equal share of the rights to which all are entitled in our land.

March 30, 1979.

Respectfully submitted,

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APPENDIX A

NEWSOUNDS (MARCH-APRIL, 1976).

Ann Keenan: ODAS Member Helps Others to Succeed

The effectiveness of early auditory training is evident in the lives of hearing impaired persons who successfully enter professions often denied those with a hearing loss. A case in point is Ann Keenan, RN, severely deafened (80 dB loss) as a result of chicken pox at age 3. Ann works in the advanced care and rehabilitation unit at Memorial Hospital Medical Center in Long Beach, California with patients, age 18 to 100 years, who are learning to cope with the effects of total joint implanation, stroke, paraplegia, and quadriplegia. As staff nurse, she is responsible for patient care and treatment, which includes communication with patients and their families in an attempt to meet psychological and spiritual, as well as physical, needs. Ann notes

that her success in overcoming a handicap gives her patients a sense of security and support. "If they see I can do it, they'll think they can do it too."

An active member of ODAS, Ann often talks to parents of hearing impaired children, encouraging auditory training and speech development. She continues to develop her own communication abilities and residual hearing through speech therapy.

Ann is a graduate of a three-year program at St. Anthony's School of Nursing in Rockford, Illinois. She began speech therapy and lipreading training at age 4 and spent most of her childhood in regular classrooms. Her nursing career resulted in part from her exposure to the medical world through her physician father. As a teen-ager, she developed confidence in her ability to communicate with normally hearing people while working as a nurse's aide. She feels that, as a nurse, she is given an opportunity to work with people undergoing the stress of physical impairment.

NEW AMERICAN DEAF (FALL 1977).

A Medical First for Guinness' Book

Frank Hochman, M.D., has been selected as a resident physician by the Family Practice Program at San Francisco General Hospital.

San Francisco General is a part of the University of California School of Medicine, and a prestigious appointment.

So what has that to do with Guinness' Book of Records?

A hint. Dr. Hochman received his early education at Junior High School 47 in New York City. Oh ho! The light is beginning to dawn, right?!

Frank Hochman is the first congenitally deaf graduate of a medical school, having received his M.D. degree from Rutgers in New Jersey.

His other educational feats include: BS from City University of New York; MS in Medical Science from Rutgers.

Dr. Hochman is planning to deliver medical care to the hearing-impaired population of the Bay Area, a considerable boon to our community because it is said that the good doctor is fluent in sign language.

Special hours have been set aside for hearing-impaired patients: 1:30 to 4 p.m. at the Family Health Center, S.F. General Hospital, 22nd and Potrero.

The phone number is: 565-8606, no TTY as yet.

IMPACT 10 (JUNE 23, 1978).

Deaf Dentist's Hobby: Public Speaking

James C. Marsters, DDS, is deaf.

In his Pasadena, Calif., office, Dr. Marsters moves briskly about his business. He handles telephone calls by having his assistant listen in on another phone and repeat the message. Dr. Marsters reads her lips and then replies in a clear voice. Everyone who knows him is struck by one thing: He is an unusually gifted lipreader. That and his native intelligence and drive have helped make him what he is.

For calls to friends who are deaf, Dr. Marsters moves into an adjoining office, where he has a teletypewriter hooked up to his phone. He is the founder of TDI, Teletypewriters for the Deaf, Inc., an international organization that hopes to make telephone communications for the deaf a reality.

Dr. Marsters' wife, Alice, formerly director of Los Angeles' John Tracy Clinic Nursery for the Deaf, is hearing, as are their three children.

When he is not practicing dentistry or pursuing such favorite hobbies as flying airplanes and gliders, camping, sailing, and photography, Dr. Marsters works on the passion of his life; improving educational opportunities for deaf children. He thinks every deaf child can grow up successfully. Just like Dr. Marsters, who has yet another favorite hobby: public speaking.

Most observers would say that for a child born deaf, a future as a happy professional is the impossible dream. They may be right, but tell them to try to pass this off on the deaf orthodontist in Pasadena.